No. 75-287

Supreme Court, U. S.
FILED
OCT 22 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

HERMAN DIAMOND, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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The United States brought this action to enjoin petitioner from further filling estaurine marshlands within the navigable waters of the United States, in violation of Section 10 [1] of the Rivers and Harbors Act of 1899 ("the Act"), 30 Stat. 1151, 33 U.S.C.

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[1] Section 10 generally forbids the creation of unauthorized obstructions in the navigable waters of the United States.

403.[2] The litigation involves a small strip of tidal marsh along Richardson Creek, a tributary of the Wilmington River, one of the major tidal rivers of Chatham County, Georgia.

Beginning shortly after his acquisition of the marshland in 1965, petitioner gradually filled the property in order to create enough fast land to obtain a county building permit for a house (Pet. 3, 4). In 1965, petitioner applied for a permit to build a dock on the property but did not apply for a permit to fill the land (Pet. 3). The United States Army Corps of Engineers, which is charged with enforcement of the Rivers and Harbors Act, first became aware of the fill activity during a routine inspection of Richardson Creek in June 1972. On at least three subsequent occasions, representatives of the Corps of Engineers or the State of Georgia advised petitioner that his filling of the marshlands was unauthorized and illegal (Ga. App., pp. 6b-7b).[3] Petitioner disregarded these warnings, and the United States instituted this action seeking a permanent injunction against further filling of the tidal lands and a mandatory injunction requiring removal of the fill material. On April 17, 1974, the district court found that

[2] The State of Georgia later intervened in the action, seeking a permanent injunction against further filling or altering of tidal marshlands.

[3] The petition does not reproduce the opinions of the district court and the court of appeals. They are included as Appendices to the Brief in Opposition filed by respondent State of Georgia.

Richardson Creek was within the navigable waters of the United States to the mean high tide line and that the area filled by petitioner would have been inundated at high tide. It therefore held that the marshland was subject to Section 10 of the Act (Ga. App., pp. 7b, 10b). The district court permanently enjoined petitioner from any further fill or construction operations on this property.[4] The United States Court of Appeals for the Fifth Circuit affirmed, concluding that neither of these factual findings was clearly erroneous (Ga. App., pp. 4a-5a).

Petitioner claims (Pet. 6) that the Corp of Engineers lacked jurisdiction over Richardson Creek under Section 10 of the Act because it was not navigable as a matter of law, since it allegedly carries no commerce. But the navigable waters of the United States have historically included, but are not limited to, those lands subject to the ebb and flow of the tides. *The Daniel Ball*, 10 Wall. 557; *The Propeller Genesee Chief* v. *Fitzhugh*, 12 How. 443, 454-456. In

[4] The district court held that petitioner's filing for an after-the-fact permit to fill this property precluded the awarding of mandatory injunctive relief, pending completion of the administrative proceedings and any appeal therefrom (Ga. App., pp. 11b-12b). See *United States* v. *Joseph G. Moretti, Inc.*, 478 F.2d 418 (C.A. 5). The district court has therefore abstained from granting a mandatory injunction and has retained jurisdiction in this case (Ga. App., p. 13b). The Corps of Engineers denied the permit on March 26, 1974 (Ga. App., pp. 2b-3b). On August 28, 1975, petitioner instituted an action in the United States District Court for the Southern District of Georgia entitled *Diamond* v. *United States, et al.*, No. 475-221, seeking review of that determination.

tidal estuaries, therefore, the navigable waters include all lands below the line of the mean high tide.[5] *United States* v. *Stoeco Homes, Inc.*, 498 F. 2d 597, 610 (C.A. 3), certiorari denied, 420 U.S. 927; *United States* v. *Joseph G. Moretti, Inc.*, 478 F. 2d 418 (C.A. 5). See also 33 C.F.R. 209.260(k)(1) and (2).

Here, the evidence established that Richardson Creek was navigable and that the mean high tide line was well shoreward of the area filled by petitioner (Ga. App., pp. 4b, 7b). The court of appeals upheld these findings (Ga. App., pp. 4a-5a), and there is no reason for further review by this Court.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1975.

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[5] The rights of the riparian property owner are subject to the paramount federal navigational servitude. *Illinois Central Railroad Co.* v. *Illinois*, 146 U.S. 387, 435; *Zabel* v. *Tabb*, 430 F.2d 199 (C.A. 5), certiorari denied, 401 U.S. 910.

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